IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN NOLAN NANCE, JR., Appellant.	No. 36884-6-II UNPUBLISHED OPINION

Van Deren, C.J.—James Nolan Nance, Jr. argues that cumulative error deprived him of a fair trial on charges of unlawful imprisonment, felony violation of a no contact order, second degree assault, felony harassment, and attempting to elude. He argues that the trial court erred by (1) failing to give a *Petrich*[1] instruction, (2) violating his Fifth Amendment[2] right against double jeopardy, and (3) imposing an exceptional sentence without a jury finding aggravating circumstances warranting an exceptional sentence and without entry of findings of fact and conclusions of law. He also contends that the trial court abused its discretion by (1) not treating

[1] *State v. Petrich*, 101 Wn.2d 566, 573, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405, 756 P.2d 105 (1988).

[2] U.S. Const. amend. V.

unlawful imprisonment and second degree assault as "same criminal conduct" when calculating his offender score and (2) excluding defense witnesses and testimony in violation of the Sixth Amendment.[3] In his statement of additional grounds for review (SAG),[4] Nance raises additional issues, none of which has merit.

We affirm the convictions for unlawful imprisonment, second degree assault, felony harassment, and attempting to elude. Based on the State's concession and our own review of the record, we vacate the conviction for felony violation of a no contact order and remand for resentencing.

FACTS

Shelly McGlaun dated Nance for nearly two years and has a child with him. McGlaun testified that her relationship with Nance was fine at first but, after about three months, he became "controlling, possessive, and abusive." VII Report of Proceedings (RP) at 717. Nance threatened to kill her on several occasions. After Nance repeatedly assaulted her, she obtained a no contact order against him in November 2005.

Nance was in prison from November 2005 until January 6, 2006. During his incarceration, he wrote McGlaun several letters saying that she "would always be his woman, [they] would always be a family, he didn't care about anybody, not the police, he just didn't give a f[***], [they] would always be together." VII RP at 719. McGlaun did not want to see Nance so, to prevent him from finding her, she moved while he was still in prison.

On January 6, 2006, McGlaun went to a 7-Eleven store on her lunch break and was

[3] U.S. Const. amend. VI.

[4] RAP 10.10.

surprised to see Nance sitting in his car in the parking lot. Although they saw each other, they did not speak. She testified that she was "terrified" to learn that Nance was out of prison. VII RP at 725.

Over the next several days, McGlaun received a number of calls from a telephone number that she did not recognize. At first, she did not answer the calls but, when she eventually called the unidentified telephone number, she learned that these calls originated from the Chieftain Motel.[5] McGlaun was unaware that Nance was staying there. Ultimately, she took the calls and they were from Nance. At first she was afraid to talk to him but, after she finally relented, he asked to see their son. Nance also wanted to continue his relationship with her. She "didn't want [their young son] to not have a father," so she tried to make an arrangement where he could see his son but not be involved with her. VII RP at 721-22. She agreed to meet Nance at a fast food restaurant. She chose the location because, unlike her apartment, there would be other people around and she knew many of the employees.

At the restaurant, Nance said again that he wanted to continue their relationship. She told him again that she did not want to be involved with him. Nance left the restaurant and, when McGlaun no longer saw his car, she left and walked a circuitous route home to prevent him from finding out where she lived.

On January 13, at approximately 10:00 pm, McGlaun left her apartment to walk to the 7-Eleven store. Nance drove up, grabbed her by her hair, and threatened to kill her if she did not get in his car. When she refused and tried to fight him off, he forced her into the car. "He asked

[5] Parties refer to the establishment interchangeably as the "Chieftain Hotel" and "Chieftain Motel" but a former employee used the name "Chieftain Motel"; thus, we refer to it as a motel. IV RP at 271-72.

[her] where their son was." VII RP at 734. She said the child was at her apartment and Nance drove straight there without asking for directions.

Nance demanded that she get the child. He threatened to kill her and her family if she refused or told anyone what was happening. After she retrieved their son, he drove them to the Chieftain Motel. Once in the motel room, Nance put the child on the bed, poured drinks for them, expressed his desire to rekindle their relationship, and asked her why she refused. She responded that he was too aggressive and that they had "been through this" before. VII RP at 737. Nance repeatedly asked her if she had engaged in sexual activity with anybody else. She kept "telling him no" but Nance grew angrier each time. VII RP at 738.

Nance then asked her the identity of the man she had been with the night before. She felt "creeped out" when she realized that Nance had been watching her apartment. Nance "firmly [and] aggressively" questioned her as to whether she had had sex with this man and she repeatedly denied it. But, after several minutes of interrogation, she finally said, "[Y]eah, you know, if that's what you want to hear, yeah." VII RP at 738-39. Nance then struck her, punching her on both sides of her face.

Nance held a knife to her throat and said that he was going to kill her and "bury [her] where nobody would ever find [her]." He put his hands around her neck and pushed her against the wall for a number of minutes. She thought that she must have lost consciousness because she saw "nothing but white." VII RP at 740. When Nance released her, she ran for the door but he grabbed her and threw her back onto the bed. He asked her if she was pregnant with another man's child. She denied it and he punched her in the stomach. The child "[was] watching the

whole thing" and "[h]e was screaming."[6] VII RP at 743.

McGlaun eventually escaped. Another guest at the motel, Nick Harris, heard her screaming and saw her on the balcony. As Harris began to climb the stairs toward her, Nance quickly passed him and exited the motel. Harris contacted the motel manager, who called 911.

When Officer Donnell Rogers of the Bremerton Police Department found McGlaun in the motel lobby, she was extremely upset, shaking, and crying profusely. She had numerous injuries, including redness, swelling and finger marks on her neck; swelling, redness, and puncture marks from an apparent blow to the ear (which caused her earring posts to push into her neck); and numerous scratches. Rogers photographed the injuries and the photographs were admitted at trial. An aid crew transported her to the hospital. A few days later, after a brief car chase, police took Nance into custody.

The State charged Nance with first degree rape, unlawful imprisonment, felony violation of a no contact order, second degree assault, felony harassment, and attempting to elude a pursuing police vehicle. The State alleged one or more aggravating circumstances for each offense. A jury found Nance guilty on all counts except first degree rape. The jury also found rapid recidivism as an aggravating circumstance because Nance committed all the offenses shortly after his release from custody.

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[6] McGlaun testified to a slightly different chronology on cross examination. She said that Nance choked and punched her after they had intercourse, which she characterized as rape. But the jury acquitted Nance of the first degree rape charge which required proof that he used a deadly weapon or kidnapped her. She later explained, on redirect, "I can't tell you exactly one hundred percent the order. I know it happened, you know. It was traumatic. Like I said, I barely remember waking up in the hospital." [VIII] RP at 829.

Nance testified that an argument regarding their son precipitated the violence. He testified that she began hitting him. He said that he put his hands around her neck and pressed her against the wall for a few minutes in self defense.

The trial court imposed an exceptional sentence of 84 months on the second degree assault charge—the standard range was 53-70 months. The trial court also imposed 60 month exceptional sentences each for the unlawful imprisonment, violation of a court order, felony harassment, and attempting to elude convictions and ran the sentences concurrently with the longer second degree assault sentence.

Nance appeals.

ANALYSIS

I. Jury Instruction

Nance argues that the trial court erred because he was entitled to a unanimity jury instruction on the unlawful imprisonment charge under *Petrich*. Jury instruction 8 stated that this crime could be committed "by physical force, intimidation, or deception" and the State contended in its closing argument that Nance imprisoned McGlaun both by holding her against the wall by her throat and by deceptively exercising control over their son in the motel room. Clerk's Papers (CP) at 160. Nance contends that jury members could have found him guilty of either act because the trial court never gave the unanimity jury instruction.

A. Standard of Review

We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

B. *Petrich* Instruction

"Criminal defendants in Washington have a right to a unanimous jury verdict." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of two or more acts constituting a single charged count, the State must identify which act it is relying on or the trial court must give a unanimity instruction. If neither occurs, "the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). We consider this issue to be one of constitutional magnitude that can be raised first on appeal. RAP 2.5(a)(3); *Crane*, 116 Wn.2d at 325.

But a unanimity instruction is not necessary where evidence demonstrates a continuing course of conduct. *Crane*, 116 Wn.2d at 326. To determine whether a continuing course of conduct constitutes a single charged count, we evaluate the facts in a commonsense manner considering (1) the time elapsed between the criminal acts and (2) whether the different acts involved the same parties, the same location, and the same ultimate purpose. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

For example, in *Crane*, our Supreme Court held that a *Petrich* instruction was unnecessary because several assaults over a two hour period constituted "continuous conduct." 116 Wn.2d at 330. Similarly, in *State v. Craven*, 69 Wn. App. 581, 588-89, 849 P.2d 681 (1993), Division One held that a defendant's repeated assaults over a three week period were sufficiently continuous. And we held in *State v. Marko*, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) that a defendant's statements to two different people over 90 minutes constituted a continuous course of conduct for the crime of intimidating a witness.

Here, the State charged Nance with unlawful imprisonment, which can be "accomplished by physical force, intimidation, or deception." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 39.16, at 720 (3d ed. 2008). The trial court instructed the jury that to convict Nance of unlawful imprisonment it had to find:

> A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception.
>
> The offense is committed only if the person acts knowingly in all these regards.

CP at 160. In closing arguments, the State told the jury:

> When I questioned [Nance] about [the pushing] what did he admit? That he held [McGlaun] against the wall by her throat for a period of minutes. Did she want to be held by her throat for a period of minutes? He admitted: No, that she did not. . . .
>
> He admitted it. He admitted to unlawfully imprisoning her. That's just one way he did it. He kept her in a [m]otel room by the simple fact that he had [their son] in his arms. That little boy that he apparently loves so much became a huge pawn in this case. Taking away that little boy from where he was safe; taking him to that hotel room; carrying him up those stairs because he knew in his mind that . . . McGlaun was not going to leave [the child] with his dad. The ultimate deception; the ultimate control. Take the thing you love the most.

X RP at 981-82.

During his testimony, Nance admitted that he physically restrained McGlaun in the motel room but he asserted that holding her neck against the wall was merely self defense. McGlaun's statements confirm Nance's assault and her confinement. He squeezed her neck until she saw "nothing but white." VII RP at 740. McGlaun testified that when Nance released his grip, she ran for the door but Nance threw her onto the bed. Police observed that McGlaun's neck was swollen and "very, very red" with "distinct finger marks . . . on both sides of her neck." IV RP at

190. Her throat exhibited petechia, a red rash caused by a "sudden loss of oxygen," and her injuries were consistent with strangulation. V RP at 493.

Moreover, the record shows that Nance kept her in the motel room by wielding control over their son. After Nance forced McGlaun into his car, his next goal was to acquire the child. Nance drove to McGlaun's apartment, told her to retrieve their child, and threatened to kill her and her family. He then drove to the motel, grabbed the child from the car, and escorted McGlaun to the room. By taking control of their child, he intimidated and coerced her into staying in that room, even after he became violent.[7]

Under a commonsense evaluation of these facts, Nance's actions evidence a continuous course of conduct whereby he imprisoned McGlaun in the motel room using both physical force against her and hostile control over their child. *See Love*, 80 Wn. App. at 361. Nance's acts occurred over a short period—between their arrival at the motel around 11:00 pm and her escape around 1:30 am. McGlaun was the only victim and the motel was the only location of his criminal conduct. Nance's ultimate purpose in holding McGlaun by the neck against the wall for a few minutes and keeping their son was to prevent McGlaun from leaving. Accordingly, no *Petrich* instruction was necessary and we find no error.

[7] Although McGlaun testified that she was not worried that Nance would injure the child, Nance had taken the child during an argument in April 2005. Apparently, McGlaun was frightened by the possibility Nance would take the child again.

II. Double Jeopardy

Nance claims that the trial court violated his Fifth Amendment[8] right to be free of double jeopardy because the second degree assault conviction cannot serve as the predicate assault that elevates violation of a no contact order from a gross misdemeanor to a felony. The State contends that these convictions do not violate double jeopardy, but nevertheless

> concedes that the felony violation of a no contact order charge must be vacated . . . either because the jury may have improperly relied on the second degree assault as a basis for the felony violation of a no contact order charge (thereby creating a sufficiency of the evidence issue), or because the jury instructions regarding the no contact order were insufficient because they did not contain the statutory language requiring the jury to find an assault that "d[id] not amount to . . . assault in the first or second degree."

Br. of Resp't at 21 (quoting former RCW 26.50.110(4) (2000)).

Under *State v. Ward*, 148 Wn.2d 803, 806, 64 P.3d 640 (2003) and *State v. Azpitarte*, 140 Wn.2d 138, 142, 995 P.2d 31 (2000),[9] the State correctly concludes:

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[8] "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[9] In *Azpitarte*, the jury convicted a defendant for second degree assault and felony violation of a no contact order. The felony violation of the no contact order was predicated on Azpitarte's two assaults—"the second degree hair pulling and the [uncharged] fourth degree arm pulling." *Azpitarte*, 140 Wn.2d at 140. The jury instructions permitted the jury to convict him of the felony violation but failed to specify which assault was necessary for the enhancement. *Azpitarte*, 140 Wn.2d at 140.

Our Supreme Court vacated the felony violation of a no contact order, holding that former RCW 10.99.040(4) (1998) "clearly states that second degree assault cannot serve as the predicate to make the violation a felony." *Azpitarte*, 140 Wn.2d at 141-42. The pertinent language of former RCW 10.99.040(4)(b) also appeared in former RCW 26.50.110(4) and stated, "Any assault that is a violation of an order . . . and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony"—necessarily elevating the no contact violation to a felony. The *Azpitarte* court vacated the defendant's conviction for felony violation of a no contact order because the jury may have relied on the second degree assault. 140 Wn.2d at 141-42.

In *Ward*, our Supreme Court also held that the language in former RCW 26.50.110(4)

> [W]hen the State charges both assault in the second degree and felony violation of a court order, the jury must be informed (either through an instruction or an election) that a specific assault cannot serve as the basis for both counts. In addition, the jury instructions for violation of a court order failed to include the language "d[oes] not amount to assault in the first or second degree," which the *Ward* court implied would be necessary when (as in the present case) the State files charges of both violation of a court order and assault in the second degree.

Br. of Resp't at 24 (quoting former RCW 26.50.110(4)). Although the record does not specify the statutory basis for Nance's no contact order, we surmise from the parties' heavy reliance on *Ward* and *Azpitarte* that RCW 10.99.040[10] and former RCW 26.50.110 serve as the basis.

We accept the State's concession and vacate Nance's conviction for felony violation of a no contact order. *See Azpitarte*, 140 Wn.2d at 142. Thus, we do not discuss Nance's double jeopardy issue.

III. Exceptional Sentence

Nance next challenges his exceptional sentence, arguing that the trial court relied on the aggravating circumstances of domestic violence, on which the jury was not instructed and on which it did not return verdicts. RCW 9.94A.535(3)(h). The State agrees and asks us to remand for resentencing because (1) the judgment and sentence incorrectly included this aggravating circumstance and (2) the trial court failed to enter written findings of fact and conclusions of law regarding the exceptional sentence.

"A remand for resentencing is required where the reviewing court cannot conclude from the record that the trial court would have imposed the same sentence if it had considered only the

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"does not amount to assault in the first or second degree" and is not an essential element that the State must prove to convict for felony violation of a no contact order, unless "the State additionally charges the defendant with first or second degree assault." 148 Wn.2d at 806.

[10] RCW 10.99.040(4)(a) provides, "Willful violation of a court order issued under subsection (2) or (3) of this section is punishable under RCW 26.50.110."

valid aggravating factors." *State v. Smith*, 67 Wn. App. 81, 92, 834 P.2d 26 (1992). And "[n]ot every basis for an exceptional sentence must be valid for an appellate court to uphold that sentence provided it is satisfied a trial court would have imposed the same sentence based solely on the remaining valid factor(s)." *State v. Dillon*, 142 Wn. App. 269, 277, 174 P.3d 1201 (2007), *review denied*, 164 Wn.2d 1012 (2008).

Here, we disagree with the State's concession. Our review of the record and the sentencing hearing, indicates that the trial court clearly based Nance's exceptional sentence solely on the aggravating circumstance of rapid recidivism, noting that "[w]ithin days of leaving jail . . . [Nance] violated a court order." RP (Sept. 28, 2007) at 10. The trial court made no mention of domestic violence. As such, we conclude that the trial court disregarded counsels' mistaken assertion that the jury also found domestic violence as an aggravating circumstance and treat as clerical error the inclusion of domestic violence as an aggravator in the judgment and sentence. Therefore, we uphold the exceptional sentence and do not remand for resentencing on this issue.

IV. Offender Score—Same Criminal Conduct

Nance also argues that the trial court abused its discretion in not finding that his unlawful imprisonment and second degree assault convictions were "same criminal conduct" for sentencing purposes. Br. of Appellant at 14.

"[A]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). And "waiver *can be found* where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494, 158 P.3d 588 (2007). Accordingly, a "defendant's

'failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion' waived the challenge to his offender score." *Shale*, 160 Wn.2d at 495 (quoting *State v. Nitsch*, 100 Wn. App. 512, 520, 997 P.2d 1000 (2000)).

Here, Nance failed to raise the issue of same criminal conduct at sentencing. Because he failed to identify any factual dispute for the trial court to resolve or to invoke the trial court's discretion, we hold that Nance waived the issue and do not further address it.

V. Exclusion of Defense Evidence and Witnesses

Nance further claims that the trial court's refusal to allow him to confront and compel witnesses in a variety of situations violated his Sixth Amendment rights to confront witnesses and to present his case.[11] He argues that this was a "he-said, she-said" case, so any evidence that may have impeached McGlaun's credibility was admissible. We disagree.

Nance misperceives the evidence of his crimes. This was not a "he-said, she-said" crime, where the only evidence of the offenses came from the two participants. Nance himself admitted to holding McGlaun by the neck against the motel wall without her consent. Furthermore, the responding police officer observed physical evidence of Nance hitting McGlaun in the face and grabbing McGlaun by the neck and the hospital treated her for multiple injuries consistent with an assault.

A. Standard of Review

We review a trial court's decision to exclude or admit evidence and testimony at trial under an abuse of discretion standard. "[T]he trial court's decision will be reversed only if no

[11] "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. amend VI.

reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). "A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise admissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But "the admission or refusal of evidence lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent an abuse of discretion." *Rehak*, 67 Wn. App. at 162. Even relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice[or] confusion of the issues." ER 403. And evidence is unfairly prejudicial if it is "likely to stimulate an emotional response rather than a rational decision." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

"Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal." *Thomas*, 150 Wn.2d at 856. Evidentiary errors that do not prejudice the accused will not necessitate reversal of the conviction. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Such errors are "'not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002) (internal quotation marks omitted) (quoting *Bourgeois*, 133 Wn.2d at 403).

B. Confrontation Clause

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting U.S. Const. amend. VI). This right includes a defendant's right to cross-examine witnesses and inquire into

possible ulterior motives for testifying. *See Van Arsdall*, 475 U.S. at 678. But

> [i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Van Arsdall, 475 U.S. at 679. And the same is true in Washington. "'In the exercise of this [Sixth Amendment] right, the accused . . . must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Rupe*, 101 Wn.2d at 690 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Although Nance implicates the Sixth Amendment, his assignments of error are evidentiary and, thus, within the trial court's discretion.

C. Challenged Evidentiary Rulings

1. Name of McGlaun's Workplace

Nance's counsel engaged in the following exchange with McGlaun during her cross-examination:

> [DEFENSE COUNSEL]: In January of '06 were you employed?
> [MCGLAUN]: Yes.
> [DEFENSE COUNSEL]: And where were you employed at?
> [MCGLAUN]: I'm still employed at that place, so I'd rather not say.

[VIII] RP at 781.

At that point, Nance's counsel requested a side bar, explaining that she wanted to show inconsistency between McGlaun's testimony at trial and in a deposition. Counsel also wanted to elicit that McGlaun saw Nance socially during the week after he was released, even though she

claimed only limited interaction before the night of January 13. Specifically, Nance's counsel wanted to elicit testimony that McGlaun worked with two individuals at KCR,[12] who had Nance and McGlaun over for pizza that week.

The State then read relevant portions of the deposition in which McGlaun explained her relationship with the two coworkers. The trial court allowed counsel to ask questions about McGlaun's interactions with them but ruled that the name of her current and 2006 employer was not relevant to that line of inquiry. After the ruling, Nance's counsel elected not to ask any further questions on that subject.

Nance argues that the trial court violated his right to confront McGlaun, relying on decisions by the United States Supreme Court upholding the right to expansive cross-examination that may lead to other evidence. But Nance's counsel did not show any effort to engage in explorative cross examination; rather, she wanted to ask McGlaun about two coworkers and whether they socialized with Nance and McGlaun during the week before January 13. And the trial court allowed such an inquiry, just "not based upon where she works now."[13] [VIII] RP at 789. Because the name of McGlaun's employer was not relevant, the trial court did not abuse its

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[12] Although the record does not provide this detail, Nance asserts that "KCR is a well known acronym for Kitsap Community Resources, a local non-profit organization." Br. of Appellant at 19 n.2.

[13] Nance makes much of the trial court's later mistaken recollection of the defense's cross-examination question and that McGlaun herself interjected that she continued to work at the same location. Nance posits that the trial court's ruling was motivated by personal safety issues, after "reading the colloquy as a whole" and argues that where she was employed in 2006 should not have been a proper reason to exclude this evidence. Br. of Appellant at 22. Besides, he argues, McGlaun, herself, volunteered that she continued to work there and Nance's counsel told the court, "I could care less where she works now." [VIII] RP at 788. Finally, he contends that "the information about her employment was well known to all the parties," because both trial counsel knew. Br. of Appellant at 22. Nevertheless, "[e]vidence which is not relevant is not admissible" and Nance fails to make any relevance argument. ER 402.

discretion in refusing inquiry about the identity of her employer.

2. Exclusion of the Telephone Records

The defense offered copies of McGlaun's telephone records and the trial court initially admitted them over the State's objections. During McGlaun's cross-examination, defense counsel had her read highlighted portions of a telephone records exhibit. Defense counsel also had McGlaun write a number of telephone calls on a board that the jury could observe.

McGlaun testified that her home phone number was 405-0707 and that Nance's cellular telephone number was 710-0135. She could not identify whose number was 204-8874. There was substantial confusion regarding how the telephone records denoted the date of calls and the length of calls. Someone from McGlaun's home telephone number called the 204-8874 telephone number and vice versa on January 7, 8, 9, 11, and 13.

Following this testimony, the trial court asked the parties to present oral argument regarding the telephone records' admissibility. The State argued that the defense had failed to present anything to explain whose telephone numbers were listed and objected to the confusing nature of the telephone records.

The trial court then excluded the telephone records as exhibits, explaining:

> While it makes some sense to me, I don't have a person with background from this company to enlighten the jury exactly what's going on. I'm not admitting these documents, one, because I think they're confusing; and secondly, because I believe that the details that are provided are as extrinsic to the testimony that's been given. And more importantly, as I said, the confusion that could be culled from the material, without someone to testify from the phone company exactly what it refers to, and how their system works, what the times are, is important.
>
> You have the witness. You have the testimony documented by the diagram that's on the board, and the testimony that's been given. The issue involves her credibility, which is always material to the case. But the issue itself does not involve the issue that's before the court, and that is the alleged rape and assault that occurred.

> I allowed the testimony to be given because her credibility is material. But without more information from the telephone company, I'm not going to allow these exhibits. So I'm going to strike Exhibits 129 and 130.

[VIII] RP at 852-53. Defense counsel objected, stating that she had been in contact with a telephone company representative who could have testified but when the State agreed not to raise the confusion issue the defense counsel released the subpoena for the representative.

Nance testified that he preferred to use a pay telephone instead of his cellular telephone because it was cheaper and that his prepaid cellular telephone number was 204-8874. He said that he used a pay telephone to contact McGlaun on the 12th. As Nance testified, he wrote telephone numbers on a display board as follows (for clarity, we note McGlaun's phone number):

> [DEFENSE COUNSEL]: Just real quick, I'd like you to review what's Exhibit No. 130, if you could, on the paper behind you. Could you write -- there's some highlighted numbers on there, could you write down those highlighted numbers?
> [NANCE]: (Witness complies).
> . . . .
> [DEFENSE COUNSEL]: On the first [page] could you, you've already written 405-0707 [McGlaun] to 479-3113.
> [NANCE]: Yes.
> [DEFENSE COUNSEL]: That was on the 13th?
> [NANCE]: Yes.
> [DEFENSE COUNSEL]: Of 2006?
> [NANCE]: Yes.
> [DEFENSE COUNSEL]: At what time?
> [NANCE]: 17:09 or 7:09.
> . . . .
> [DEFENSE COUNSEL]: Could you go to the next page where it's highlighted?
> [NANCE]: Yes.
> [DEFENSE COUNSEL]: Could you state the page number?
> [NANCE]: That's page 13.
> . . . .
> [DEFENSE COUNSEL]: You have highlighted numbers there. Could you state the phone numbers?
> [NANCE]: Yes. The first number would be 360-479-9270. And that was to 360-405-0707 [McGlaun].

[DEFENSE COUNSEL]: So the 9270 number is where the call originated from?
[NANCE]: Yes.
[DEFENSE COUNSEL]: And the date on that?
[NANCE]: 1/12/06.
[DEFENSE COUNSEL]: And the time?
[NANCE]: 19:12 or 7:12.
[DEFENSE COUNSEL]: Could you state the next one?
[NANCE]: 479-9270. And it was originated from that number. And it was called to 405-0707 [McGlaun]. That's 1/12/06.
[DEFENSE COUNSEL]: And the time?
[NANCE]: 17:42 or 5:42.
[DEFENSE COUNSEL]: And finally the third one?
[NANCE]: It originated from 405-0707 [McGlaun]. And it was called to 479-9270. That's 1/12/06.
[DEFENSE COUNSEL]: And the time?
[NANCE]: 18:34 or 6:34.

[VIII] RP at 924-27.

Nance argues that "[t]he trial court erred by excluding the records" because "[t]he records were relevant to show that Ms. McGlaun was regularly calling Mr. Nance, contrary to her testimony otherwise." Br. of Appellant at 35. But Nance cites no authority to support this argument. He fails to explain how the trial court abused its discretion by excluding telephone records that were confusing and duplicative of live testimony by both McGlaun and Nance. We hold that the trial court did not abuse its discretion by refusing to admit the records themselves when McGlaun and Nance had both testified to the existence of telephone calls on the days in question.

3. Defense Investigators Not Listed as Witnesses before Trial

On the last day of the third week of trial, Nance's counsel indicated that she wished to call two defense investigators, Don Lutes and Jim Harris. The trial court denied her request and the defense rested. Nance's counsel made an offer of proof, acknowledging that the investigators

were not on her witness list and they were not presently available at the courthouse. She said that she would have called Lutes for her case in chief to "state what these phone numbers are, where they're to." [VIII] RP at 947.

> I wanted to bring Don Lutes in so I could -- I've introduced evidence to the jury about these phone numbers. My client can't testify to these phone numbers to be able to say, yeah, this is a phone number to a pay phone. This is a phone number to the Chieftain [M]otel. And I can't do that now, because they weren't available at 3:45.

[VIII] RP at 947-48. As for Harris, defense counsel explained:

> And I would want to call Jim Harris to rebut Ms. McGlaun's testimony that when he went there to take her interview, that he told her she had to talk with him, and he was there with another detective. And to rebut what occurred. Because back in June of 2006 it was a different attorney on the case, and there was a different investigator. And I want that investigator to be able to testify to what occurred then.

[VIII] RP at 947.

The State responded that these witnesses were not on the witness list; therefore, the State had no notice that the defense would call them and no opportunity to interview them. The trial court ruled, "We're in the third week at this time. And to have the witnesses not available, and with the given amount of time the court was faced with, that was a decision I made. You've made your objection, but I'm standing on that." [VIII] RP at 948-49. The defense did not request a continuance to secure Lutes's and Harris's testimony.

The next morning, Nance's counsel requested that the trial court reconsider its ruling:

> I have them present here at court ready to testify. I'd ask that the court reconsider. It was a quarter to four, they weren't here. And I feel that they could offer rebuttal evidence for some statements that the victim talked about, regarding the interview that occurred in June. As well as my other investigator can offer -- testify to what the phone numbers are that were brought out on my direct with Mr. Nance. And they're here ready to -- my one investigator wasn't here yesterday, because he had a 3 o'clock doctor's appointment. And the other investigator I had

> not -- I had played phone tag with, and was in court, and wasn't able to contact him.

[IX] RP at 956. The State argued that the trial court had "instructed the parties, not just me, . . . to have witnesses available. And we, the [S]tate, went through great pains to do that. We had witnesses here multiple times." [IX] RP at 957. The trial court denied the motion for reconsideration.

Initially, the State claims that Nance failed to make a specific offer of proof regarding the substance of what the potential defense witnesses' testimony was to preserve this issue on appeal. But Nance's offer of proof "to rebut what occurred" at the interview between the defense investigators and McGlaun is sufficient to preserve the issue on appeal. XIII RP at 947; ER 103(a)(2). In Nance's motion to reconsider, he offered "rebuttal evidence for some statements that the victim talked about, regarding the interview that occurred in June."[14] [IX] RP at 956. Nance also made a sufficient offer of proof on the issue regarding telephone numbers on McGlaun's telephone bill that she could not identify.[15]

Nance argues that this ruling violated his Sixth Amendment right to compel witnesses

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[14] For the first time on appeal, Nance asserts that Harris would have impeached McGlaun's testimony because she did not tell Harris in June 2006 that Nance waited for her in the car to retrieve their son, contrary to her testimony that Nance accompanied her into the hallway of her apartment complex. Nance also asserts both investigators would have impeached McGlaun's statement that they did not identify themselves as defense investigators and did not let her elaborate on her answers. But defense counsel confronted her with her prior testimony on cross-examination and, although the trial court allowed the defense to use transcripts to impeach McGlaun, the defense did not do so.

[15] Lutes apparently would have testified that there were a number of telephone conversations between McGlaun and a caller from the Chieftain Motel and a caller from a pay telephone. His testimony would have impeached McGlaun's assertions that she received many telephone calls, did not know who was calling at first, and that she was not planning to meet Nance on January 13. It would have bolstered Nance's testimony that McGlaun agreed that he could pick her up.

because they would have impeached McGlaun's testimony. But the State points out that a trial court's ruling to exclude an undisclosed witness in the defense's case in chief does not violate the Sixth Amendment, relying on *Taylor v. Illinois*:

> The simplicity of compliance with the discovery rule is also relevant [to Sixth Amendment analysis]. . . . [T]he Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. *The burden of identifying them in advance of trial adds little to these routine demands of trial preparation*.

484 U.S. 400, 415-16, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (emphasis added).

Even so, "[r]ebuttal witnesses need not be listed."[16] *State v. Finnegan*, 6 Wn. App. 612, 625, 495 P.2d 674 (1972).

Assuming, but not deciding, that the trial court should have let Lutes and Harris testify, we nevertheless hold that it was harmless error because, although McGlaun's credibility was an issue, the evidence is overwhelming that Nance both assaulted McGlaun and unlawfully imprisoned her. Nance himself admitted to these criminal acts during his trial testimony. That Nance and McGlaun may have met consensually does not alter the clear evidence of Nance's assault and unlawful imprisonment of McGlaun at the motel.

4. Exclusion of Testimony Regarding Child Protective Services (CPS) Complaint, McGlaun's Drug Use, and Sex Offender Living with Grandmother

The State filed a motion in limine to exclude any reference to McGlaun's alleged prior drug and alcohol use without the trial court's prior approval, citing ER 403, ER 607, and

[16] The State argues that the defense's failure to list these witnesses constituted a discovery abuse and that the trial court properly excluded their testimony. In light of our harmless error analysis, we do not consider this argument.

pertinent case law. Nance argued that this evidence was "highly relevant" because McGlaun had a motive to retaliate following his letter to CPS alleging that McGlaun used drugs and that her mother, who who cared for their child, was engaged to a sex offender. II RP at 96. The State pointed out that CPS ultimately concluded that the allegations were "unfounded" and expressed concern that raising this issue would "smear the victim" and "create a mini trial within a trial." II RP at 99.

The trial court granted the State's motion but ruled that the defense was

> entitled to present the case that a CPS complaint was filed by your client. The reasons for the complaint will not be stated. It will also be the case that CPS found the complaint to be unfounded. That will be admitted. Your client is entitled to make the argument that the CPS complaint was the motive, was the reason, or retaliation against that, why this was brought up, and what was alleged. I am not going to raise specters of the drugs or sex offenders. It is clear that whatever was happening, your client felt it required him to file a complaint. That can be gone into. It can also be gone into by the State, if it's not brought out, that the complaint was determined to be unfounded by CPS.

II RP at 111. Later, the trial court stated, "I am allowing that there was a CPS complaint filed. There will be no additional information. And I have also allowed that it was determined to be unfounded." III RP at 145. When the issue arose during McGlaun's and Nance's testimony, the trial court reaffirmed its decision.

Nance now contends that the trial court's ruling "violated [his] Sixth Amendment right to compel witnesses by denying [him] the opportunity to introduce the reason he and Ms. McGlaun were fighting." Br. of Appellant at 27 (emphasis omitted). He argues that he was entitled under

the doctrine of res gestae[17] to explain that his fight with McGlaun followed an argument in which he threatened to take their child away based on his CPS allegations. Nance claims that the specific details of this argument gave McGlaun a "'motive to lie'" and explained her "'state of mind'" that night. Br. of Appellant at 28 (quoting [VIII] RP at 772-73).

Here, the trial court crafted a solution whereby Nance could elicit testimony that he had filed a CPS complaint against McGlaun and to argue that it gave McGlaun motive to lie about Nance's crimes but also allowed the State to admit testimony that the allegations were ultimately determined to be "unfounded." In doing so, the trial court did not abuse its discretion. Nance testified that he and McGlaun had an argument "about who was watching [the child] while she was at work" but he elected not to testify about his CPS complaint following the trial court's ruling. [VIII] RP at 907. This does not show that the trial court abused its discretion.

5. Exclusion of Aurora Thomas's Testimony

Following Nance's opening statement, the State asked for a ruling on whether Aurora Thomas would be allowed to testify for Nance. The trial court required Nance to present his offer of proof of Thomas's proffered testimony. In that offer of proof, Thomas testified that she invited Nance to her home for lunch, although she could not remember the date or month of the invitation. While Nance was at her home, a woman called him. Nance asked Thomas whether the

[17] Res gestae is the "same transaction" exception to ER 404(b) in which evidence is admissible "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" *Powell*, 126 Wn.2d at 263 (internal quotation marks omitted) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)). This "exception requires that evidence 'be relevant to a material issue and its probative value must outweigh its prejudicial effect.'" *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004) (quoting *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)). Here, Nance's conversation and subsequent argument with McGlaun about sex offenders and drug use may constitute an "act" under ER 404(b) but, nevertheless, the danger of undue prejudice substantially outweighed its probative value.

unidentified woman and her child could join them and Thomas agreed. A heavyset white woman with shoulder length hair brought her infant to Thomas's house.

Other than describing the woman's weight, race, and hair,[18] Thomas could not describe what the woman looked like because she "didn't really pay attention to look at her." [VIII] RP at 894. Thomas could not describe the child and she did not know whether the child was related to Nance.

The trial court excluded Thomas's testimony:

> I've concluded that this witness will not be allowed to testify for the following reasons: First of all, there's no specificity in the time when this happened. She cannot remember the date. She doesn't have a good memory of the individual. She said there's no relationship she knew between the defendant and the baby, from her memory. And I believe that although the defendant of course can testify to all these events, I'm not going to allow this witness to speak to that, because I don't believe it's specific enough to allow it to happen.

[VIII] RP at 896. When Nance testified, however, he described the lunch, telephone call, and subsequent visit by the woman and child.

Nance claims that the trial court's exclusion of Thomas's testimony "violated [his] Sixth Amendment right to compel witnesses." Br. of Appellant at 31 (emphasis omitted). But the record demonstrates that Thomas could not provide testimony relevant to the charged incidents. *See* ER 401, 402. ER 401 defines relevance as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, Thomas's testimony consisted solely of an undated encounter with Nance, a woman with a rough likeness to McGlaun, and the unidentified woman's

[18] The parties disagree about whether Thomas accurately identified the length of McGlaun's hair during the relevant time period of January 2006. The record only indicates that at trial McGlaun's hair reached down her back and that in January of 2006 it was two inches shorter.

child. We hold that the proffered testimony failed to have any tendency to make it more or less probable that Nance assaulted McGlaun or held her against her will on January 13, 2006, and it was, therefore, not relevant. Thus, the trial court did not abuse its discretion in excluding Thomas's testimony.

6. State's Objection to Nance's Testimony

Nance testified that he and McGlaun were in daily contact after his release until the incidents on January 13. Moreover, he testified to spending the night at her apartment and hiding whenever McGlaun's mother came over. He rented a motel room, to obtain a measure of privacy, and told McGlaun about it. The State objected to this last statement as self-serving testimony. The trial court sustained the objection in part and overruled it in part, explaining that Nance could testify about his own actions but not about what others said to him. Nance testified to his version of the events and that McGlaun asked him to pick her up at 10:00 pm on January 13; again the State objected and again the trial court sustained the objection to the extent that Nance's testimony contained hearsay.

Nance argues that the trial court improperly prevented him from testifying that he and McGlaun discussed "stay[ing] together" and "sleep[ing] together" at the Chieftain Motel. Br. of Appellant at 35 (emphasis omitted). He contends that, under the *Hillmon*[19] doctrine and ER 803(a)(3), "[o]ut-of-court statements that tend to prove a plan, design, or intention are admissible . . . to show the declarant's state of mind and plan." Br. of Appellant at 36. The State contends that, despite the trial court's ruling excluding this testimony, Nance ultimately testified to virtually everything the trial court excluded, including that "he talked to the victim; obtained the hotel

[19] *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 295, 12 S. Ct. 909, 36 L. Ed. 706 (1892).

room half an hour after this conversation; had a second (and then a third) phone conversation with Ms. McGlaun and that he then waited to pick her up until 10:15; and, that she knew he was coming so he waited outside for her." Br. of Resp't at 47. The only precluded information was that McGlaun asked Nance to pick her up but this was apparent from the context of Nance's testimony.

Under ER 803(a), "hearsay evidence is admissible if it bears on the declarant's state of mind and if that state of mind is an issue in the case." *State v. Terrovona*, 105 Wn.2d 632, 637, 716 P.2d 295 (1986). "Under *Hillmon*, therefore, a declarant's statement of future intent is admissible to prove: (1) that the declarant went to the place indicated by his or her statement of intention, and (2) that the declarant went there with the other named party." *Terrovona*, 105 Wn.2d at 639.

Here, Nance's testimony clearly informed the jury that he and McGlaun were in amicable contact before they went to the Chieftain Motel and that it was their mutual plan to spend the night. He testified twice to this objected-to testimony. Furthermore, the jury did not return a guilty verdict on the rape charge based on McGlaun's claim that Nance raped her at the motel. We hold that the trial court did not abuse its discretion in excluding hearsay testimony about what McGlaun may have told Nance, which is the only portion of the testimony the jury did not hear.

D. Harmless Error

Finally, an abuse of the trial court's discretion in any of these evidentiary rulings was harmless. Within reasonable probabilities, the trial outcome would not have differed absent any such error because the physical evidence of assault and Nance's own testimony about his grabbing McGlaun around the neck and holding her against her will against the motel room wall was

overwhelming evidence of the crimes for which he was convicted. *See Everybodytalksabout*, 145 Wn.2d at 469.

VI. Cumulative Error Doctrine

Nance contends that cumulative trial court error warrants reversal of his convictions. We apply the cumulative error doctrine "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). In this case, we do not find an accumulation of errors that denied Nance a fair trial.

VII. Statement of Additional Grounds for Review Issues[20]

A. Ineffective Assistance of Counsel

Nance claims that his counsel was ineffective because she (1) did not subpoena

[20] We considered arguments Nance raises in his SAG in conjunction with the same issues raised by his appellate counsel. We briefly address some here. Nance argues that the trial court erred by failing to give a curative instruction when the State alluded to a kidnapping during trial and defined "kidnapping" during closing arguments. But "kidnapping" is included in jury instruction 7 relating to first degree rape, for which he was acquitted and which is not before us on appeal. Accordingly, this argument has no merit.

Nance also claims that the prosecutor improperly sold Nance's car following his arrest. Nance raised this issue at sentencing but the trial court ruled that the issue was not before it. And, aside from Nance's bare assertion, no evidence in the record supports this claim, so we do not consider it. *McFarland*, 127 Wn.2d at 335. We note that any personal property, including a car used in the commission of a felony, is subject to seizure and sale by the police. RCW 10.105.010.

Nance also argues that when the trial court appointed his trial counsel, Jeniece LaCross, it violated his Sixth Amendment right to conflict free representation "because I fired her brother David LaCross who was my fi[r]st attorney on this case and whom I filed a bar complaint against." SAG at 6. But this information is also outside the record and we do not consider the argument. *McFarland*, 127 Wn.2d at 335.

McGlaun's mother, who he says would have told a different story than her daughter;[21] (2) failed to list the defense investigators as witnesses before trial; and (3) suggested that he plead guilty to second degree assault "with sexual motivations and a deadly weapon[] enhan[c]ement, . . . unlawful imprisonment, felony elude, no contact order, and felony harassment."[22] SAG at 7.

To establish ineffective assistance of counsel, Nance must show that his counsel's performance was deficient and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35. First, Nance does not demonstrate prejudice regarding his counsel's failure to subpoena McGlaun's mother as a defense witness. Because counsel made no offer of proof, there is nothing to suggest what her testimony would have been. She watched the child for a short time on the night of the January 13 but we do not know how her story would differ from McGlaun's and do not consider facts outside the record on direct appeal. *McFarland*, 127 Wn.2d at 335. Furthermore, Nance failed to ask the trial court for a continuance to secure McGlaun's mother's presence.[23]

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[21] Late in the trial, Nance's counsel asked whether the State intended to call McGlaun's mother and the State said, "No." Nance's counsel then stated, "I would ask you have her available, because I'm going to call her. She's under subpoena by the [S]tate. She's been present. So I would ask that the [S]tate have her available." [VIII] RP at 860. The State responded that it had already released McGlaun's mother from its subpoena. Nance's counsel objected, stating that she "just assumed [the mother was] under subpoena." [VIII] RP at 860. The trial court stated that one side cannot necessarily rely on the other side's subpoenas. The trial court recessed and no further discussion of the mother occurred.

[22] He argues that such a plea agreement would have resulted in a sentence under the Persistent Offender Accountability Act, chapter 9.94A RCW, and would have resulted in a life sentence without the possibility of parole.

[23] Nance argues that the State's decision not to call McGlaun's mother as a witness violated his Sixth Amendment rights. Although the Sixth Amendment guarantees a defendant's limited right to call witnesses and cross-examine prosecution witnesses, it does not guarantee the right to force the State to make witnesses available for the defense. S*ee Van Arsdall*, 475 U.S. at 678-79. As such, Nance's claim fails.

Second, Nance cannot demonstrate prejudice regarding the investigators because his counsel did try to call the investigators for rebuttal testimony but the record demonstrates that their only potentially relevant testimony related to McGlaun's testimony about events that transpired before she and Nance were in the motel room. These events relate to the charge of first degree rape, the one count where the jury acquitted Nance. And Nance admitted that he assaulted and restrained McGlaun in the motel room; thus, the investigator's testimony would not have changed the trial outcome.

Third, although Nance asserts that his counsel suggested he plead guilty to an unfavorable plea bargain, there is no evidence in the record to support Nance's assertions and we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 335.

B. Prosecutorial Misconduct

Nance also argues that the prosecutor "flagrant[]ly appeal[ed] to the passion and prejudice of the jury" and, in so doing, committed prosecutorial misconduct. SAG at 6. He cites to the State's closing argument wherein the State argued that McGlaun gave credible testimony and Nance did not. Nance also argues that the prosecutor improperly gave her own opinion of his guilt, in violation of *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988). Finally, he argues that it was misconduct for the prosecutor to answer "yes" to questions on the jury verdict form. X RP at 1050.

> In order to establish prosecutorial misconduct, [a defendant] must prove that the prosecutor's conduct was improper and prejudiced his right to a fair trial. Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. In addition, prosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or

> her arguments, and are not so prejudicial that a curative instruction would be ineffective.

State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citations omitted) (internal quotation marks omitted) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). "To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, [we] view[] the challenged comments in context." *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

> "It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, . . . it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion*."

McKenzie, 157 Wn.2d at 53-54 (alteration in original) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)), *overruled on other grounds by State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984).

In *Belgarde*, our Supreme Court held that a prosecutor's statements during closing argument were improper when the prosecutor argued that the defendant was "'strong in' a group which the prosecutor describe[d] as 'a deadly group of madmen[,]' and 'butchers that kill indiscriminately' [and] likened the [organization's] members to 'Kadafi' and [members of] 'S[in]n F[éi]n,'" an Irish political party affiliated with the Irish Republican Army. The court explained that the prosecutor was not permitted "to call to the attention of the jury matters or considerations which the jurors have no right to consider." *Belgarde*, 110 Wn.2d at 508.

No such remarks were made in the present case. In fact, credibility of the witnesses is

precisely what a jury must consider. *See State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). And because we look to the entirety of the State's closing arguments, the issues of the case, the evidence discussed in the closing, and the jury instructions, we conclude that the State's arguments were not improper and, in any event, did not affect the outcome of the case in light of the overwhelming evidence of Nance's guilt.

C. Conflict of Interest

Finally, Nance argues that his former attorney in this case, Craig Kibbe, had a conflict of interest because Kibbe represented Emmanuel Washington, who testified against Nance. Nance's counsel raised this issue before trial:

> [DEFENSE COUNSEL]: . . . .
> Mr. Washington was represented by Craig or is represented by Craig Kibbe currently, and he has worked out a deal with the State because he has come forward to provide information/testimony against Mr. Nance.
> I'm uncomfortable with that since Mr. Nance was previously represented by Craig Kibbe. I see a conflict there. Craig Kibbe represented Mr. Nance and now he represents Mr. Washington and now Mr. Washington has information against Mr. Nance that he hasn't previously --
> . . . .
> [THE STATE]: And I believe that Mr. Kibbe or Mr. Kibbe's firm was one of those attorneys appointed. I don't remember how long Mr. Kibbe represented Mr. Nance. I don't think it was for that long of a period of time.

IV RP at 169-70.

Kibbe was appointed to represent Washington. The trial court reserved ruling on Nance's objection. Later that day, the trial court revisited this argument and subsequently allowed Washington to testify:

> The attorney is not testifying. It's the client of the attorney. If that was a grounds, there would be legions of witnesses who would not be able to testify in this court because, as small as our defense bar is, there are hundreds of cases where witnesses are testifying where a current attorney has represented yet another party or the attorney of a witness once represented another defendant.

> For that reason, I don't believe a conflict exists. I will take any authority. I will reserve and reconsider, if you present authority on the issue, under the rules that are applicable, conflict rules.

IV RP at 326-27. Nance's counsel stated that she could not find authority, given the unique nature of the circumstances, "[W]here a defense attorney representing an individual is then removed from that case and then, in that very same case, that defense attorney happens to be representing somebody who's going to testify against that individual." IV RP at 327.

In this state, a lawyer owes a duty to a former client "not [to] thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." RPC 1.9(a). But we find no authority to bar Washington's testimony and we do not review alleged violations of the rules of professional conduct. Thus, we hold that the trial court did not abuse its discretion in allowing Washington to testimony.

VIII. Conclusion

We affirm the convictions for unlawful imprisonment, second degree assault, felony harassment, and attempting to elude and vacate the conviction for felony violation of a no contact order. We remand to the trial court for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

I concur:

Hunt, J.

Armstrong, J. (Dissenting) — I respectfully disagree with the majority's decision to disregard the State's concession and affirm Nance's exceptional sentence, even though the trial court improperly entered judgment on an aggravating factor that was not found by the jury. I do not believe that the record supports the majority's conclusion that the trial court would have imposed the same sentence based solely on the aggravating factor of rapid recidivism.

First, the prosecutor's oral argument at sentencing shows that the State itself did not consider the rapid recidivism aggravating factor to be the primary basis for the exceptional sentence:

> I would note for purposes of the record and for in support of the State's unusual recommendation of the statutory maximum on all counts, this was a particularly heinous crime. What is most disturbing to the state, besides the fact that he didn't just assault her, he didn't just threaten to kill her, he didn't just violate a no contact order, and he didn't just allude a pursuing police vehicle, all of these crimes stacked up on one another and were done in a brutal fashion. That is why the state alleged the special allegations and the jury found them.
>
> What makes it particularly heinous was that the majority of these crimes occurred in front of victim and the defendant's one year old little guy. And that deserves more than the standard range.
>
> There's really nothing else to say, other than the rapid recidivism is particularly troubling as well. He wasn't even out of jail for a week and he's committing another strike offense. This case cries out for a very, very stiff punishment[.]

RP (Sept. 28, 2007) at 4-5.

The prosecutor's point about the "particularly heinous" character of Nance's crimes falls under the excluded aggravating factor that is the issue of this case: the fact that the offense "occurred within sight of sound of the victim's or the offender's minor children under the age of eighteen years." RCW 9.94A.535(3)(h)(ii). And while the prosecutor did go on to mention the rapid recidivism aggravating factor, she appears to have done so as a mere afterthought.

Second, contrary to the majority's assertion that "the trial court clearly based Nance's exceptional sentence solely on the aggravating circumstance of rapid recidivism," Majority at 12, the trial court's oral ruling does not shed any significant light on the matter. The trial court did note that Nance committed his crimes "[w]ithin days of leaving jail," RP (Sept. 28, 2007) at 10, but this observation hardly establishes, at least to my satisfaction, that the trial court would have imposed an identical sentence without the erroneous presence of a domestic violence aggravating factor. In fact, the trial court never explicitly connected the exceptional sentence to any aggravating factor, instead focusing on how Nance's crimes were inconsistent with his stated desire to be a good father.

I would accept the State's concession and remand for resentencing. Therefore, I dissent.

_____

Armstrong, J.